No. 88-938 (1)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THE BOEING COMPANY, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF OF PETITIONER THE BOEING COMPANY

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PETITIONER'S REPLY BRIEF

Petitioner The Boeing Company submits this Reply Brief in response to the Brief for the United States. This Reply Brief addresses only three issues raised by the government: the standard of review, the proper construction of the intent requirement of § 209, and the effect of disclosure on a common law conflict of interest claim.

I. Standard of Review

One of the primary issues raised in the individuals' and Boeing's petitions is whether the court of appeals exceeded its authority under Fed. R. Civ. P. 52(a) in reversing the trial court's factual findings on the

petitioners' intent. In its opposition, the government attempts to convert the issue of intent from a finding of fact to a legal conclusion and asserts that the clearly erroneous standard of Rule 52 is not applicable to this case. Government brief at 43. These arguments ignore the express language of § 209, the governing standard of appellate review, and the holdings of the courts below.

1. The government argues that the severance "payments at issue here were, *as a matter of law*, 'supplementations of salary' made 'as compensation for' federal services within the meaning of Section 209(a). . . ." Government brief at 42 (emphasis added). According to the government, "[i]t is irrelevant whether petitioner Boeing 'intended' and the individual petitioners 'understood' the payments to be a 'supplementation' or 'compensation' in whatever different sense either they or the district court might have used those terms." *Id.* at 43. Indeed, the government goes so far as to claim that the trial court's finding on petitioners' intent "is not governed" by the clearly erroneous standard of Rule 52(a). *Id.*

The government's analysis appears merely to be an attempt to resurrect its argument, rejected by both courts below, that § 209 creates an objective standard of conduct or strict liability crime that does not require a showing of intent. This argument, as the government admits, was rejected by the court of appeals. Government brief at 8. The court of appeals unequivocally held that "compensatory intent" is required under § 209, Pet., App. A, 7a, but, while paying lip service to the clearly erroneous standard, substituted its own inferences for the trial court's findings of fact that Boeing did not intend the payments as com-

pensation for government services. These findings were amply supported by the record and therefore should not have been reversed on appeal under Rule 52(a). Boeing submits that the court of appeals was correct in concluding that § 209 requires a showing of intent, but that it committed reversible error in its application of the standard of review.

2. Through its transparent assertion that the severance payments violated § 209 as a matter of law, the government attempts to avoid the application of the proper standard of review and implicitly acknowledges that the Fourth Circuit must have reweighed the evidence in making *de novo* fact findings in contravention of Rule 52(a). Clearly, the Fourth Circuit did not reverse the district court on this issue of law or remand for the finding of other facts.[1] Thus, the government's argument either ignores the holding of the court of appeals that § 209 requires proof of intent or seeks to discard the standard of review that necessarily governs issues of intent. *See Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982) (issue

[1] The government brief cites *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986), for the proposition that Rule 52(a)'s clearly erroneous standard does not apply to this case. In *Icicle Seafoods*, this Court reversed the court of appeals for making *de novo* fact findings contrary to the dictates of Rule 52(a). In so doing, the Court delineated the courses open to any court of appeals: remanding for the finding of additional facts necessary to the correct legal resolution; setting aside fact findings under the clearly erroneous standard; or reversing on the law. The Fourth Circuit below followed none of these courses. It made its own findings of fact on the issue of intent, concededly by choosing among contradictory evidence that had been weighed differently by the district court, and by drawing inferences rejected by the district court.

of intent is a factual question subject to review only under the clearly erroneous standard of Rule 52(a)). Despite the government's attempt to substitute a new standard of review, the Fourth Circuit must be reversed on this issue alone.

II. Intent Under § 209

This case was tried to a district court judge who, based on all the evidence, including trial and deposition testimony, concluded that neither Boeing nor the individual defendants intended the severance payments as salary or a supplementation of salary for government services rendered by the individuals. The government clings on appeal, as it did at trial, to a simplistic theory of violation of § 209. This theory is predicated on the faulty assumption that any payment that is not declared to be solely for past services is intended to compensate for future government services. In this case, the government's only support for an inference of improper intent is the existence of computation sheets considering salary differentials and other prospective elements in the calculation of the amount of severance pay recommended to decision-makers within the Company.[2] Government brief at 38.

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[2] Despite the government's reliance on these documents, the district court found, based on record evidence, that these calculations were made by the personnel department and that "[t]hose responsible for the ultimate decision were not aware of the specific calculation method . . . and approved severance payments . . . based on their determination that the proposed payment was reasonable and fair." Pet., App. B, 20a, ¶ 20. The district court made other fact findings regarding the intent of the parties including findings that the payments were not contingent upon entering government service, the position assumed in federal government, remaining in government for a period of

Because the government adopted this theory of violation, it failed to adduce or has ignored evidence of intent from testimony of the individual petitioners or persons at Boeing involved in the decisions.[3] As a

time or returning to Boeing. *Id.* at 19a-21a, ¶¶ 17-27. These findings, and the evidence supporting them, directly refute the inferences of intent drawn from the calculation method by the government and the majority panel below.

[3] The government now seeks to bootstrap its failure to adduce additional evidence at trial on the issue of intent by reference to omnibus trial exhibits. Government brief at 3 n.3. Exhibit 110 (comprising 88 pages) and Exhibit 111 (comprising 135 pages) were not in the Joint Appendix below and each is a collection of assorted, largely handwritten scraps of notepaper that have never been identified, were not the subject of trial testimony, or, for the most part, deposition testimony. The government's brief represents that one page of Exhibit 110 (included at Tab 14 in Exhibits Lodged with Court) is signed by the Executive Vice President of Boeing Aerospace Company. It is not signed by any person, is partially illegible and does not not bear the name of any Executive Vice President. There is no evidence of what the document means or who authored it. After a colloquy on the admissibility of these documents at trial (JA 192-94), the trial judge, without a jury, stated, "I am going to admit these documents. What worth they have, we will determine at a later time . . ." JA 194. It is apparent that he determined that they were entitled to little or no weight, a fact which is not altered by the government's mischaracterization and continued reliance on them.

At various points the government has asserted that it could not call Boeing witnesses at trial because they were beyond the jurisdiction of the court. *See, e.g.*, Reply Brief of the United States to the court of appeals dated September 22, 1987, at 18 n.19. Of course, the government elected to file its complaint in the Eastern District of Virginia rather than the Western District of Washington, and never requested the presence of any Boeing witnesses at trial or sought to compel additional testimony through possible means such as *de bene esse* depositions.

result, the government must argue, as it does in its brief, that the objective characteristics of a severance payment render it *per se* unlawful under § 209 regardless of the parties' intent. This theory was not only rejected by the court of appeals, it is directly contradicted by the language of the statute itself and the congressional intent underlying it, as well as prior interpretations by the Office of Legal Counsel.

1. The starting point for interpreting a statute is the plain meaning of the language itself. *Consumer Product Safety Comm'n. v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). If the language is unambiguous, it "must ordinarily be regarded as conclusive" unless there is a "clearly expressed legislative intention to the contrary." *Id.* at 108. *Accord, Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495 n.13 (1985).[4]

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[4] Even contemporaneous sources of congressional intent, such as committee reports or the title of the Act, can be resorted to only to resolve ambiguity. *Davis v. Michigan Department of Treasury*, ___ U.S. ___, 109 S.Ct. 1500, 1504 n.3 (1989); *United Airlines, Inc. v. McMann*, 434 U.S. 192, 199 (1977); *Unexcelled Chemical Corp. v. United States*, 345 U.S. 59, 64 (1953); *Kuehner v. Irving Trust Co.*, 299 U.S. 445, 449 (1937); *Fairport, P. & E. R. Co. v. Meredith*, 292 U.S. 589, 594 (1934). *Railroad Commission of Wisconsin v. Chicago, B. & Q. R. Co.*, 257 U.S. 563, 589 (1922) ("Such aids are only admissible to solve doubt and not to create it.").

The government here urges on the court a panoply of extraneous sources as aids to statutory construction: legislative, administrative and private party advocates of legislation (*e.g.*, Government brief at 14 & n.10, 15-18 & n.13, 20); congressional hearings and reports supporting prior failed legislation (*e.g.*, Government brief at 14 & n.10, 16-18, 22); and pre-enactment law review articles (*e.g.*, Government brief at 16-18, 20). This Court has frequently admonished against reliance on such sources of congressional intent. *E.g.*, *American Trucking Association v. At-*

Here, the government's analysis on the issue of intent is directly contradicted by the language of the statute itself. Relying on *United States v. Bailey*, 444 U.S. 394 (1979), and *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978), the government argues that because the statute "does not use language of intent," it "should not be interpreted as one of those rare criminal statutes that requires a showing that the defendant acted with the purpose . . . of producing the particular effect that the statute proscribes." Government brief at 41-42. Instead, according to the government, it is sufficient to show that "the defendant knowingly made or received payments having the characteristics that render them 'supplementations of salary' and 'compensation for' services performed as a federal official. . ." *Id.* at 42. This conclusion is simply wrong.

The language of § 209, as the court of appeals recognized, is clear: the payment or receipt of any salary, contribution to or supplementation of salary must be paid or received "as compensation for" services as a government employee in order to violate § 209. Pet., App. A, 7a. Contrary to the government's assertion, the language "as compensation for" does not signify some objective "characteristic" or resultant "effect" of a payment (Government brief at 42); it sets forth a requisite element of the statute: the payments must not only supplement salary, they must also be intended "as compensation for" gov-

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chison, Topeka, and Santa Fe Ry. Co., 387 U.S. 397, 418 (1967) ("The advocacy of legislation by an administrative agency—and even the assertion of the need for it to accomplish a desired result—is an unsure and unreliable, and not a highly desirable guide to statutory construction.").

ernment service. As both the majority of the court of appeals panel and Judge Hall, in dissent, recognized, it is this element that distinguishes between payments that violate § 209 and those that do not. Pet. App. A, 7a, 8a, 14a.[5]

2. The government's analysis of the intent requirement is also contradicted by previous interpretations of § 209 as reflected in opinions of the Office of Legal Counsel. Those opinions make clear that, in the view of the Department of Justice, the propriety of a payment under § 209 turns on the "subjective intent of the parties," Sept. 15, 1977, Op. OLC at 1, reprinted in Government brief, App. B at 46a, and, therefore, "cannot be resolved conclusively on the basis of documents alone, but . . . require[s] actual investigation of all surrounding facts and circumstances bearing on intent." May 10, 1976, Op. OLC at 7, reprinted in Government brief, App. B at 28a. *See also* July 24, 1977, Op. OLC at 4 ("question of violation [of Section 209] depends to a large extent on the subjective intent of the parties"); October 7, 1976, Op. OLC at 1, reprinted in Government brief, App. B at 31a; 41 Op. AG 217, 221 (1955). The government relies heavily on these opinions, but selectively disregards this construction, arguing instead that the testimony of

[5] The legislative history of § 209, as reflected in contemporaneous committee reports, confirms the plain meaning of the language of the statute. When Congress replaced § 1914 with § 209 in 1962, it substituted the phrase "as compensation for" government service for the phrase "in connection with" government service. Congress changed the language "to emphasize the intent that the prohibition is against private payment *made expressly* for services rendered to the Government." H.R. Rep. No. 748, 87th Cong. 1st Sess. 24-25 (1962) (emphasis added).

petitioners on the issue of intent is "irrelevant" because the severance payments violated § 209 "as a matter of law." Government brief at 42-43.

3. The government also asserts that the testimony of the parties should be rejected as self-serving. Government brief at 44 n.38. Not only is this position a paradoxical attempt to ascertain intent without reference to the state of mind of persons involved, it is also contrary to the practice of the Criminal Division of the Department of Justice in interpreting § 209. In concluding that a severance payment received by then Attorney General William French Smith did not run afoul of § 209, the Criminal Division emphasized that "the intent of the payment is crucial." JA 90. In reaching this conclusion, the Criminal Division conducted an investigation and relied on the interview statements of representatives of the payor company and Attorney General Smith that they did not intend or understand the payment to be a salary supplement as compensation for Smith's government service. JA 83-92. The district court considered comparable evidence in this case, and there was no sound basis for the Fourth Circuit to displace the lower court's determinations.

4. The government's analysis would render § 209 a strict liability statute and make it impossible to determine the legality or illegality of any severance payment. Even the government concedes, however, that not all severance payments violate § 209, including those that are made "on the basis of past services." Government brief at 38. The basis or purpose of the payment, by definition, depends on the intent of payor. By rejecting the significance of testimonial and other evidence on this issue, the gov-

ernment's rule would replace any informed inquiry into the purpose underlying the payment with a superficial analysis of whether the payment has the "effect" of compensation for government service. Such a rule is unworkable in a practical sense and is contrary to the language of the statute.

5. The government's theory is also at odds with the congressional purpose of § 209—the prohibition against a government employee serving two masters. Even the secondary sources of authority cited by the government refute its objective theory of a § 209 violation in this case. Assuming some weight is to be accorded the report of the New York Bar Association dated several years before Congress enacted § 209, the report, as quoted by the government, states that § 209 was directed to the concern that by paying the salary of the government employee, " 'the outside payor has a hold on the employee deriving from his ability to cut off one of the employee's economic lifelines.' " Government brief at 16. By their nature, ongoing or periodic payments from a non-government source may raise a concern—much as an economic interest like stock ownership prohibited by 18 U.S.C. § 208—because of their express or subtle potential to influence day to day decisions of the government employee to assure that the payments continue. Such continuing payments in the discretion of the payor might unwittingly influence honest employees or, at least, raise sufficient potential to cause Congress to prohibit the practice under § 209.

A lump-sum severance payment prior to entry into government service simply does not raise this concern. Absent a *quid pro quo* agreement or mutual understanding of an intent to influence government

service, a pre-employment severance payment does not have the potential to influence the rendering of government service any more than the satisfaction of prior employment, the benefits of a high salary for prior employment or generous retirement benefits. There is no indication that Congress sought to proscribe a pre-employment lump-sum severance payment under § 209, or that it had any concern or reason to do so. Such payments do not cause an individual to serve two masters and therefore do not present an inherent conflict of interest. By predicating its case on the factors used in preliminary calculations of the severance payments rather than the intent underlying their payment and receipt, the government ignores the purpose of the statute and, like the majority panel below, completely distorts the intent requirement of § 209.

III. The Effect of Disclosure

The government's analysis on the issue of whether the petitioners' disclosures of the severance payments obviated any actual or apparent conflict of interest is also flawed.

1. Relying on *United States v. Mississippi Valley Generating Company*, 364 U.S. 520 (1961), the government argues that because § 209 contains no statutory waiver provision, petitioners' disclosures of the severance payments cannot exempt them from liability. Government brief at 47. The factual circumstances and the statute at issue in *Mississippi Valley*, however, bear little resemblance to the situation presented here.

In *Mississippi Valley*, the Court held that a government contract was unenforceable because the fed-

eral employee responsible for its negotiation had a financial interest in the contract in violation of 18 U.S.C. § 434. 364 U.S. at 523-24. Section 434, the predecessor of § 208, prohibited government employees from transacting business on behalf of the government with any entity in which the employee had a financial interest. Understandably, the Court held that the employee was not exempt from the statute merely because his superiors were aware of his affiliation with the company that held the contract. *Id.* at 561. The Court did not hold, however, that a government employee's disclosures could *never* obviate a conflict under any of the conflict of interest statutes.[6]

The receipt of a severance payment by a future government employee is distinctly different from the prohibition embodied in § 208. By definition, there is always an actual conflict of interest when a government employee transacts business on behalf of the government with an entity in which it has a financial interest. Not so with a severance payment, which even by the government's admission, can create only the potential for or appearance of a conflict or no conflict at all. Thus, the policy considerations that concerned the Court in *Mississippi Valley*—that the

[6] In fact, because of the specific nature of the conflict of interest covered by § 208, the statute contains a provision in § 208(b) for granting a waiver after disclosure of the financial interest held. Boeing submits that there is no parallel provision in § 209 for pre-government employment severance payments because the statute was never intended to proscribe them. In any event, the disclosures made by some of the individual defendants might very well have satisfied such a provision if it were similar to § 208(b). *See* Pet., App. B, 21a, ¶ 26 (fact finding of district court relating to disclosures of defendant Jones and Paisley).

employee's superiors might not discern or "might in fact share" the employee's conflict—stand on different footing in this case. Where, as here, there is no inherent or ongoing conflict or only the potential for a conflict, the concerns underlying waiver are simply not present.

2. Boeing's disclosures to the government of its severance pay practice and the individuals' disclosures are particularly relevant here because, unlike *Mississippi Valley*, this case is a common law civil action predicated on the standards of § 209. The government's claim against Boeing lies in tort for inducing a breach of fiduciary duty by the individuals and creating "a conflict of interest situation." JA 12; Complaint ¶ 16. Because § 209 does not provide for a civil cause of action by the government, this case is necessarily governed by common law principles of tort and agency in conjunction with the standards set forth in § 209. *See Continental Management, Inc. v. United States*, 527 F.2d 613, 617 n.3 (Ct. Cl. 1975).[7]

3. The government argues that because § 209 does not contain a waiver provision, courts may not apply the common law principle of agency that only secret

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[7] Throughout its brief, the government takes inconsistent positions on a number of issues, including this one. On the one hand, the government asserts that its claims arise under the common law based on the standard of conduct set forth in § 209, while simultaneously rejecting the applicability of agency principles. Government brief at 49-50; JA 12, 124, 126, 272; Complaint ¶¶ 1, 16. Similarly, the government claims that although § 209 is a criminal statute, the civil, rather than the criminal, standard for intent should govern. Government brief at 42. This inconsistent analysis reflects the difficulty the government has in articulating a viable cause of action against petitioners.

profits or payments create a conflict in a civil action predicated on § 209. Government brief at 52. In fact, the reverse proposition is true.

If a criminal conflict of interest statute, such as § 208, has an express waiver provision, then the requirements of that provision should be met in a civil action because the standards set forth in the statute are clear. By contrast, if the statute does not contain an express requirement for waiver or disclosure, then common law principles should supplement the statutory standards because the standards themselves derive from the common law of agency. *See Continental Management*, 527 F.2d at 617. Indeed, in virtually every other civil case predicated on conflict of interest statutes—including statutes without waiver provisions—courts have applied agency principles and held that disclosure can obviate a conflict of interest. *See, e.g.*, *United States v. Carter*, 217 U.S. 286, 306 (1910); *United States v. Kenealy*, 646 F.2d 699, 704 (1st Cir.), *cert. denied*, 454 U.S. 941 (1981); *United States v. Kearns*, 595 F.2d 729, 734 (D.C. Cir. 1978); *United States v. Drumm*, 329 F.2d 109, 113 (1st Cir. 1964); *United States v. Drisko*, 303 F. Supp. 858, 860 (E.D. Va. 1969). Because the government's case against petitioners is a common law, not criminal, action, it should be governed not only by the standards set forth in § 209, but also by common law principles of agency. Thus, if the Court were to find a potential conflict of interest in this case, the disclosures that took place obviated that potential conflict, or at least, have prevented the government from suffering any compensable injury.

Respectfully submitted,

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